No. 88-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

-v.-

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

# BRIEF OF THE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND THE SOUTH CAROLINA DEATH PENALTY RESOURCE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

H. PATTERSON McWHIRTER
President
South Carolina Public
Defenders' Association
119 East Main St.
Lexington, SC 29072
(803) 359-5522

DAVID I. BRUCK
Richland County
Public Defender
1701 Main St.
Columbia, SC 29201
(803) 765-2592

* JOHN H. BLUME
FRANKLIN W. DRAPER
S.C. Death Penalty
Resource Center
P.O. Box 11311
Columbia, SC 29201
(803) 765-0650

*Counsel of Record

ATTORNEYS FOR
AMICI CURIAE

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# MOTION BY THE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND THE SOUTH CAROLINA DEATH PENALTY RESOURCE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 36.3, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center move for leave to file the brief submitted herewith as

amici curiae. Counsel for the Respondent has consented to the filing of the brief, but counsel for petitioner would not give timely consent.

The South Carolina Public Defenders' Association, Inc., is a nonprofit organization consisting of public defenders and assistant public defenders from the each of South Carolina's sixteen judicial circuits. Among the Association's objectives is to improve the quality of criminal defense representation for indigent persons in South Carolina, including cases in which the state seeks the death penalty. Furthermore, the attorneys who comprise the membership of the Public Defenders' Association are involved in almost every capital trial in South Carolina. S.C. Code Sec. 16-3-26(A) (1988 Cum. Supp).



The South Carolina Death Penalty Resource Center was created by the South Carolina Bar for the purpose of assisting appointed counsel in the representation of indigent death-sentenced prisoners. The primary goal of the Resource Center is to improve defense representation in capital cases by offering expert support, legal guidance and technical assistance to court-appointed counsel. The Resource Center provides such assistance to attorneys appointed at all stages of the capital sentencing and appellate process, from trial through federal habeas corpus review. The Resource Center legal staff also serves directly as counsel of record in fourteen capital cases now pending in the South Carolina state and federal courts.

Because the membership of the South Carolina Public Defenders' Association and the staff of the South Carolina Death Penalty Resource Center are involved, to one degree or another, in almost every capital case in South Carolina, amici believe that they have a broad perspective on the questions presented in this case which would be beneficial to this Court. Furthermore, due to their extensive involvement in providing representation to persons against whom the state seeks the death penalty, amici have a special interest in helping to ensure that the capital sentencing process remains reasonably rational, predictable and fair. This case will decide whether the lives of convicted offenders may be condemned or spared on the basis of irrelevant, misleading and



unrebuttable "facts" concerning the purported religious and civic attributes of their victims. Because the answer to this question may determine whether capital sentencing proceedings will remain focused on the offender and his crime, or whether their focus will shift to a confusing and bitter courtroom battle over the value of the murder victim's life, the present case implicates many of the most fundamental concerns of the amici organizations.

For all these reasons, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center believe that the filing of this amici curiae brief is desirable because it presents to the Court significant information about the context in which this case has arisen. The brief

is an amici curiae brief in the truest sense. It provides the Court with a unique perspective which differs from those of the parties and will substantially assist this Court by providing it with a different and important perspective from which to evaluate the facts of this case. With that perspective, the Court will be in a better position to evaluate the particular facts about South Carolina and the detailed legal arguments which the parties are presenting in their briefs.

Accordingly, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center respectfully request the Court to grant this motion for leave to file a brief as



amici curiae.

Respectfully submitted,

John H. Blume
S.C. Death Penalty
Resource Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

Counsel of Record
for Amici Curiae

January 31, 1989

## QUESTIONS PRESENTED

I.

Whether a murder victim's purported religious faith and good citizenship provide a constitutionally permissible basis upon which to sentence his murderer to death.

II.

Whether the prosecutor violated respondent's due process rights by offering the victim's purported good qualities as reasons to impose a death sentence, under circumstances in which the defendant was prevented by state law from presenting countering evidence and argument.

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## STATEMENT OF INTEREST OF AMICI CURIAE

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**BRIEF OF AMICI CURIAE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND SOUTH CAROLINA DEATH RESOURCE CENTER**

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## OPINIONS BELOW

The opinion of the South Carolina Supreme Court affirming respondent's convictions, reversing his death sentence, and remanding for a new sentencing proceeding was filed on June 6, 1988, and is reported as State v. Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988).

## STATEMENT OF JURISDICTION

The Attorney General of the State of South Carolina filed a timely petition for writ of certiorari requesting that this Court review the judgment of the South Carolina Supreme Court. Certiorari was granted on October 11, 1988. The jurisdiction of this Court rests upon 28

U.S.C. §1257(3) and Supreme Court Rule 20.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution which states, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

## STATEMENT OF FACTS

Respondent Demetrius Gathers was convicted of participating in the murder of a man whom he and several associates encountered in a Charleston, S.C.



municipal park. The victim, Richard Haynes, was an unemployed 31-year-old former mental patient who affected the title of "Reverend Minister Haynes." The state's evidence at the guilt-or-innocence phase of respondent's trial showed that Haynes, who passed his days as an itinerant street preacher, went to the park on the evening of the murder carrying a bag containing several Bibles, a plastic angel, a sheet, some personal papers and a bottle of olive oil which he used to anoint people. At the park, he was robbed and fatally assaulted by respondent and several other persons. Police officers found Haynes's rifled bag and its contents at the scene of the murder, and during the guilt-or-innocence phase of respondent's bifurcated murder trial these items were offered as

evidence by the prosecution and admitted without defense objection.

The issue before this Court arose when, at the sentencing hearing which followed petitioner's conviction for murder, the prosecutor extracted from Haynes' personal effects a printed prayer and a voter registration card, and used these exhibits as the evidentiary basis for the following argument to the jury:

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this religious items, [sic] his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer.

"Dear God, help me to be



a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other

guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth



defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who is [sic] Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

The trial jury sentenced respondent to death.[1] On appeal to the South Carolina Supreme Court, respondent alleged, inter alia, that his sentence should be reversed because the prosecutor had improperly injected the alleged good

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[1]Defense counsel did not attempt to meet or rebut the state's argument. However, in light of established South Carolina law, this is not surprising. In State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985), decided several years before the trial of this case, the South Carolina Supreme Court held that a capital defendant may not introduce evidence regarding the bad character of the victim in mitigation of punishment. See also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988) (recognizing that Gaskins precludes admission of evidence regarding victim's bad character). Because of Gaskins and other decisions of the South Carolina Supreme Court, respondent had no notice and could not have anticipated that the prosecution would argue that the victim's Christianity and good citizenship were reasons that Gathers should be sentenced to death.



character of the murder victim as a sentencing consideration. The South Carolina Supreme Court accepted this contention, holding that the comments violated this Court's intervening decision in Booth v. Maryland, 482 U.S.___, 107 S.Ct. 2529 (1987). The state supreme court concluded:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion that appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. Accord State v. Gaskins, [284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985)] (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

295 S.C. at 484; 369 S.E. 2d at 144; J.A. at 66.

The Attorney General did not file a petition for rehearing in the South Carolina Supreme Court, nor did it move to stay the remittitur returning jurisdiction to the trial court. Some six weeks after the remittitur was duly sent down from the South Carolina Supreme Court, divesting that Court of all further jurisdiction in this case, the state filed a petition for writ of certiorari in this Court.[2] In the

[2]Before proceeding to the merits of the state's constitutional arguments, it should be noted that the failure of the petitioner state of South Carolina to request that the South Carolina Supreme Court stay the remittitur, as required by Rule 17 of that court's rules, effectively removes the power of this Court to affect the judgment now under review. On June 17, 1988, counsel for both parties were advised that the remittitur in this case had been sent to the Clerk of Court for Charleston County. The Attorney General of South Carolina did not file its petition for writ of certiorari until August 5, 1988, two months after the decision of the South Carolina Supreme Court and six weeks



after the remittitur had been sent down to the Charleston County Clerk of Court. Therefore, while this Court may have jurisdiction to review the decision of the South Carolina Supreme Court, any decision rendered in this case would be merely advisory. This is so for the following reasons.

South Carolina law is settled that once the remittitur has issued, the state supreme court is without power to alter, amend, or clarify its previous decision. See, e.g., Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548, 549 (1970) (after remittitur has issued state supreme court has no jurisdiction); see also Thomas v. Lynch, 87 S.C. 44, 68 S.E.2d 817 (1910) ("when the remittitur has been properly sent to the Court below, the Supreme Court loses jurisdiction, and thereafter neither the Court, nor any justice thereof, can make any order in the case"); State v. Adams, 83 S.C. 149, 65 S.E. 220 (1909) ("this Court has held that its control of the judgment ends when the remittitur has been sent down") Mayes v. Evans, 80 S.C. 362, 61 S.E. 657 (1908) ("the remittitur having been sent down, this court has no jurisdiction"). In fact, the South Carolina Supreme Court lacks even the power to entertain a motion to recall the remittitur after the remittitur has been sent to the trial court. Carpenter v. Lewis, 43 S.E. 881, 65 S.C. 400 (1902); McKenzie v. Sifford, 52 S.C. 394, 29 S.E. 811 (1898); State v. Merriman, 35 S.C. 607, 14 S.E. 394, 395 (1892). Thus because no motion to stay the remittitur was filed by petitioner

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and because the remittitur has been sent down and has been properly filed in Charleston County, the state supreme court is without power to recall the remittitur, or to modify its previous decision in any other way.

The failure of the petitioner Attorney General to comply with established state procedure to stay the remittitur pending the filing and disposition of the petition for certiorari renders any decision that this Court might ultimately render merely advisory. See generally Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965). The effect of the state's procedural default is that, even were the judgment of the South Carolina Supreme Court to be reversed by this Court, the state supreme court would be powerless on remand to alter or amend its previous judgment in conformity with this Court's opinion. In short, respondent's entitlement to a new trial now rests on an adequate and independent state ground arising from petitioner's procedural default in failing to move to stay the remittitur. The final judgment of the South Carolina Supreme Court granting respondent a new sentencing trial has been filed in the lower court, and pursuant to state law must be enforced. Thus regardless of what conclusion this Court would ultimately reach as to the merits of the questions presented, Demetrius Gathers must and will receive a new sentencing trial.

"[T]he oldest and most consistent



petition, the state urged that Booth should not be held to extend to prosecutorial comment on evidence properly admitted at the guilt phase of a capital trial, or in the alternative that Booth should be overruled. Certiorari was granted on October 11, 1988.

## SUMMARY OF ARGUMENT

Far from showing why Booth v. Maryland

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thread in the federal law of justiciability is that federal courts will not give advisory opinions." Flast v. Cohen, 392 U.S. 83 (1968). This rule emerges from the case and controversy requirement of Article III of the Constitution. In order for a claim to be justiciable pursuant to Article III, the case "must present a real and substantial controversy which unequivocally calls for adjudication of the rights" asserted. Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan J., concurring). As a corollary principle, this Court will not decide "abstract, hypothetical or contingent questions." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). Thus to adjudicate a case which does not present a real and substantial controversy would call for this Court to issue an advisory opinion.

should be limited or overruled, this case demonstrates why the least controversial aspect of Booth--its exclusion of the "social worth" of a murder victim as a capital sentencing consideration--was correctly resolved. Indeed, the facts of this case show why a retreat from this principle as enunciated in Booth would convert the capital sentencing process into a demoralizing tangle of emotionally-charged irrelevancies. The prosecutor's emotional appeal for a death sentence based on his depiction of the murder victim as a devout Christian and a good citizen violated the Eighth Amendment because: (a) it diverted the jury's attention from the facts of respondent's crime, his character and record, and his personal moral blameworthiness; (b) it was itself



without fair support in the evidence; (c) it was by its nature difficult if not impossible to rebut; and, (d) it was injected into the proceedings despite the fact that South Carolina law had effectively assured respondent and his counsel that he need not be prepared to rebut such evidence, and indeed precluded him from mounting such a rebuttal. The solicitor's argument thus violated both the Eighth Amendment requirement that any decision to impose death as punishment be free from the influence of arbitrary or irrelevant factors, Gregg v. Georgia, Caldwell v. Mississippi, and the elementary due process principle that no defendant be condemned on the basis of facts that he is not permitted to explain or rebut. Gardner v. Florida.

Whatever the superficial appeal of petitioner's present claims, they would, if accepted, require this Court to recognize and enforce a constitutional right of capital defendants to attempt to "mitigate" their crimes by establishing that their victims were themselves people of bad or weak character, or that they held unpopular political or religious views. See Booth v. Maryland, 107 S.Ct. at 2541 (White, J., dissenting). Such character assassination of the memories of murdered persons would also become one of the unavoidable duties of competent defense counsel in capital cases, Strickland v. Washington, and yet another burden to be borne by the families and friends of the victim. Indeed, the due process principles of Brady v. Maryland would in many cases impose upon the



prosecutor an affirmative duty to assist the defense by providing information which the defense could use to besmirch the memory of the victim.

It was surely for such reasons as these that the South Carolina Supreme Court held, some two years before respondent's trial that the alleged bad character of a murder victim does not constitute mitigating evidence--and thus is not admissible--in a capital sentencing proceeding. State v. Gaskins. In view of Gaskins, respondent was powerless to rebut or respond to the prosecutor's devastating attack, and thus the "elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida. For these

reasons, the South Carolina Supreme Court's application of Booth and its own precedent to vacate respondent's death sentence should be upheld.

## ARGUMENT

### I. THE PURPORTED RELIGIOUS FAITH AND GOOD CITIZENSHIP OF A MURDER VICTIM DO NOT PROVIDE A CONSTITUTIONALLY PERMISSIBLE BASIS UPON WHICH TO SENTENCE A CAPITAL DEFENDANT TO DEATH.

#### A. The fact that the physical evidence which provided the opportunity for the prosecutor's summation was properly introduced at the guilt phase of respondent's trial is irrelevant to the constitutional issues before the Court.

Before discussing the Eighth Amendment and due process issues presented by the prosecutor's closing argument in this case, a word should be said about petitioner's efforts to obscure these issues by its unrelenting emphasis on the



fact that the religious tract and the voter's registration card--which provided the springboard for the prosecutor's summation--were properly introduced at the guilt-or-innocence phase of respondent's trial. Brief of Petitioner at 27, 33, 45. Petitioner correctly points out that the Victim Impact Statement found unconstitutional in Booth was introduced at the sentencing phase of the trial as evidence in aggravation of punishment, whereas the victim's personal effects here were admitted as part of the state's proof of guilt. But this difference between Booth and the present case is without logical or constitutional significance. In arguing that the circumstances under which the victim's belongings were admitted should be held to immunize the prosecutor's subsequent

exploitation of that evidence from Eighth Amendment attack, petitioner has lost sight of the elementary principle that evidence in a criminal trial may be admissible for one purpose but not for another. See, e.g., Harris v. New York, 401 U.S. 222 (1971) (Miranda-violative confession may be used to impeach defendant's trial testimony, but not as substantive proof of his guilt). A murder victim's race, his nationality or ethnic background, his political beliefs and his religion may all be admissible in proving the defendant's guilt, since such characteristics might be necessary to prove the victim's identity, to set the scene of the crime, or even to show the defendant's motive to commit murder. But it is self-evident that the presence of such evidence in the trial record does



not authorize a prosecutor to urge the sentencing authority to condemn the defendant to death because of the victim's race, McCleskey v. Kemp, 481 U.S.___, 107 S.Ct. 1756 (1987), or his political or religious beliefs. See Zant v. Stephens, 462 U.S. 862, 888 (1983) (state may not attach "aggravating" label to constitutionally-protected status, beliefs or conduct). That the murder victim's religious artifacts and voter registration card were properly before the jury at the guilt-or-innocence phase of respondent's trial is simply irrelevant to the question which this Court must answer: whether the prosecutor's exploitation of these exhibits in order to urge imposition of a death sentence based on tenuous inferences concerning the victim's

religious and civic character violated the Eighth Amendment. For the reasons that follow, amici submit that the answer to this question is yes.

B. The prosecutor's appeal to sentence the defendant to death on the basis of his victim's religious and civic attributes is constitutionally intolerable under any view of Booth.

In Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529 (1987), this Court held that evidence regarding the personal characteristics of a murder victim and the impact of his murder on his family and friends are normally inadmissible in aggravation of a capital defendant's punishment. The Booth majority concluded that this type of evidence created an impermissible risk that the decision to impose the death penalty would be based upon factors unrelated to the defendant's moral blameworthiness. 107 S.Ct. at



2533.

Booth was decided by a closely and sharply divided Court. But the holding of Booth upon which the majority and dissenting Justices disagreed is not the one applied by the South Carolina Supreme Court in this case. The primary question on which the Court divided in Booth concerned the constitutional validity of a statutory provision for informing the sentencing jury of the impact of the murder on the victim's family and community. 107 S.Ct. at 2539-2541 (White, J., dissenting); id. at 2541-2542 (Scalia, J., dissenting). Booth's other holding--that a death sentence may not turn on the perceived standing or character of the murder victim himself--occasioned no evident disagreement. Indeed, the principle that the law will

not apportion punishment according to a social gradation or hierarchy of victims is so elementary a rule of due process and equality under the law as to have occasioned little discussion in either the Booth majority or dissenting opinions.

It is perhaps for this reason that the petitioner's brief attempts to obscure rather than defend what the prosecutor actually did in his summation. According to the state, the prosecutor's prolonged and impassioned emphasis on what he implied to be the murder victim's religious beliefs and civic-mindedness was in reality no more than a discussion of the victim's vulnerability to his assailants. This recasting of the prosecutor's summation is utterly without support in the record. The fact that the



victim was attacked while in possession of religious artifacts may have been in some sense a circumstance of the crime. But the prosector's explicit and emotional appeal for a death sentence based on tenuous inferences about the victim's personal religious faith revealed nothing about either the murder or the murderer, and petitioner's insistence to the contrary may fairly be described as frivolous.

Petitioner's protestations notwithstanding, those portions of the prosecutor's summation condemned by the South Carolina Supreme Court in this case contain the very defect which even the Booth dissenters would have found unconstitutional. Just as "[i]t is no doubt true that the State may not encourage the sentencer to rely on a

factor such as the victim's race in determining whether the death penalty is appropriate," Booth, 107 S.Ct. at 2540 (White, J., dissenting), it is equally obvious that the constitution forbids such encouragement based on the victim's religious faith or his participation in civic or political activity. Indeed, it was precisely the absence of such irrelevant or invidious appeals by the prosecutor in Booth, combined with Maryland's express legislative authorization of victim impact evidence under state law, which led four members of the Court to vote to uphold the admissibility of such evidence. But had the prosecutor in Booth exploited the legislatively-authorized victim impact evidence in order to fashion an appeal for death based on the victims' allegedly



majoritarian religious beliefs or their political activities, reversal would have been required under the views expressed by the dissents no less than those of the majority.[3]

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[3]At two points in its brief, petitioner suggests that the victim characteristics rejected as sentencing considerations by the South Carolina Supreme Court in this case are analogous to such factors as whether "a victim was the President, a mayor, or a police officer whose loss clearly affected society," Brief of Petitioner at 40, or whether the victim was elderly, weak or disabled. Id. at 46, 56. These comparisons are spurious. The fact that a murder victim was a government official or a police officer killed in the line of victim is unquestionably one which may be considered in aggravation of the murderer's punishment. Roberts v. Louisiana, 431 U.S. 633 (1977). This is so both because such crimes implicate society's interest in deterring attacks on those charged with carrying out essential tasks for the common good, and because the intentional killing of such public servants may fairly be seen as especially morally reprehensible, involving as it does an indirect attack upon society as a whole. Similarly, both deterrence and retribution may be served by enhancing the penalty for murders of

The Booth Court's firm and unanimous rejection of invidious victim-based appeals for death is firmly grounded in established Eighth Amendment jurisprudence. Since Gregg, the Court has repeatedly emphasized that a capital sentencer's life or death decision must turn on the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). In order for the sentencer to properly assess the defendant's moral

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especially vulnerable victims, such as the very young, the disabled, and the elderly. But the fact that a murder victim's official duties or special vulnerability may be proper sentencing considerations in no way justifies appeals for a death sentence based on such characteristics as a victim's allegedly faithful adherence to orthodox religious views, see U.S. const. amend. I (prohibiting establishment of religion), and petitioner's effort to confuse these two very different issues is wholly without merit.



blameworthiness, the focus of the penalty phase of a capital trial should be on the "relevant facets of the character and record of the individual offender" and "the circumstances of the particular offense." Id. at 798; see also Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.); California v. Ramos, 463 U.S. at 1006; Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gregg, 428 U.S. at 189 (opinion of Stewart, Powell and Stevens, JJ.).[4]

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[4]Phrased somewhat differently, this Court has stated that at the penalty phase of a capital trial the jury must make an "individualized determination of whether the defendant in question should be executed, based on the characteristics of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

In addition to holding that a death sentence cannot be influenced by arbitrary factors, this Court has also recognized that a sentence of death cannot be imposed on invidious grounds such as race, religion, class or wealth, or some other constitutionally suspect criterion. See Zant v. Stephens, 462 U.S. at 885; Furman v. Georgia, 408 U.S. 228, 249-51 (1972) (Douglas, J., concurring). While the Booth Court divided over the magnitude of the risk that Maryland's Victim Impact Statement procedure would cause sentencing juries to consider such invidious factors, no member of the Court suggested that actual consideration of such factors could ever be deemed constitutionally permissible. Moreover, the Court has recognized that the capital sentencing decision is



peculiarly susceptible to the play of arbitrary factors such as the race of the defendant and victim. Turner v. Murray, supra.[5] For all of these reasons, there is no basis whatsoever to question the continued vitality of Booth's recognition that all victims are inherently equal before the law, and that no death sentence may be imposed upon the basis of a sentencing jury's belief that the

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[5]This is especially true in the South, where the majority of capital cases arise. Permitting the characteristics of the victim to be considered by the jury in its decision whether to sentence a defendant to death will, in many cases involving white victims and black defendants, be to sanction the consideration of race in the capital sentencing process. The interjection of race may not be overt. But unconscious considerations of color will inevitably arise when the jury is expressly invited to base its sentencing decision on what it deems to be the relative social worth of the murder victim and the convicted defendant in a capital case.

victim was especially religious, "saintly," or politically orthodox.

C. Prosecutorial license to use the alleged good character of murder victims as evidence in aggravation of punishment will necessarily give rise to a constitutional right of accused murderers to attack the character and minimize the social worth of their victims.

Any doubt as to the correctness of the Court's holding in Booth that a capital sentencer's life-or-death decision should not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character," 107 S.Ct. at 2534, may be dispelled by considering the practical effect of a contrary holding. As Justice White acknowledged in his Booth dissent, there is "[n]o doubt [that] a capital defendant must be



allowed to introduce relevant evidence in rebuttal to a victim impact statement." 107 S.Ct. at 2541. While this observation was made during a discussion of the admissibility of evidence concerning the effect of a murder on the family and community of the victims, there can also be no doubt that the same right of rebuttal would arise from any effort to persuade a jury to sentence a defendant to death because of the good personal qualities of the murder victim. This case demonstrates, however, just how problematic such a right of rebuttal would actually prove to be. Here, for example, the prosecutor's portrayal of the victim as a religious "saint in the game of life," should (but under South Carolina law did not, see infra at 54-64) entitle the defendant to an opportunity

to show that the victim's religious faith was actually the psychotic and grandiose religious ideation of a chronic schizophrenic. By the same token, the voter registration card which the prosecutor held out as evidence of the victim's commitment to his community may just as easily have been obtained by the victim in order to sell his vote for a few dollars each election day. And if the prosecution was entitled to offer the former inference as a reason to sentence Mr. Haynes' killer to death, the defendant was constitutionally entitled to investigate and attempt to prove the latter as a reason why his own life should be spared.

There is nothing unusual about such doubts concerning the character of a murder victim, and once the courthouse



door is opened to them, they will arise in a substantial number of cases. Was a murdered storeowner known to use racial epithets? Did he discriminate by race in hiring or credit? Was a murdered minister a homosexual? Did an ambushed police officer have a reputation for harassing black or Hispanic citizens? Was Victim A a carrier of the AIDs virus, Victim B a secret collector of pornographic magazines, or Victim C a survivor of a suicide attempt or a cocaine overdose? Assuming that none of these facts about a murder victim were known to the killer or directly related to the crime itself, it is clear that they are utterly irrelevant to the defendant's moral blameworthiness. But, in many cases, such facts might nevertheless modulate the jury's horror

or outrage about the crime, and could well spell the difference between a sentence of life and one of death.

Recent South Carolina cases provide some revealing examples of where such diversions lead. In State v. Gaskins, the defendant was convicted in the murder-for-hire of a Death Row inmate, Rudolph Tyner. In mitigation of his punishment, the defendant sought to publish to the jury his victim's own confession to the double robbery-murder which had landed him on Death Row. See State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). Upholding the trial judge's refusal to admit this proof of the victim's bad character, the South Carolina Supreme Court held that evidence of a murder victim's bad characteristics are not admissible at the penalty phase



of a capital trial. Gaskins, 284 S.C. at 128; see also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988) (recognizing that Gaskins precludes admission of evidence regarding victim's bad character).

There is no doubt that this holding of Gaskins underlay the state supreme court's disapproval of the prosecutor's remarks in this case. Although the state court began its discussion of the issue by citing Booth's Eighth Amendment holding, the court also expressly relied on its own decision in Gaskins, and summarized Gaskins as holding that "evidence of [a] victim's bad character [is] not admissible as mitigating evidence" in the sentencing phase of a capital case. J.A. at 66.

Nor was Gaskins the only case prior to Gathers in which the South Carolina Supreme Court had had occasion to consider the extent to which character-of-victim evidence "'shift[s] the focus of the sentencing hearing away from the defendant."' State v. Gathers, 295 S.C at 483, J.A. at 66 (quoting Booth v. Maryland, supra, 107 S.Ct. at 2535). By the time that it reached this conclusion in Gaskins, the state court had reviewed trial records of cases such as State v. Horace Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied 459 U.S. 932 (1982). In Butler, the defendant was convicted of raping and murdering an eighteen year-old girl. The evidence revealed that the defendant and the accused were complete strangers before their fatal encounter. During the course of the trial, however,



defense counsel sought to bring to the jury's attention the fact that the victim had severe mental and emotional problems and had tried to kill herself on at least two occasions. Counsel also attempted to introduce evidence that the victim had been, while intoxicated, at fault in an automobile accident which resulted in the death of another party. Counsel further wished to introduce evidence in this case involving the alleged kidnapping, murder and rape of a young white woman by a black man that the victim had been known to frequent a bar, patronized almost exclusively by black persons, where illegal drugs were sold, and that the victim had bought drugs there. Finally, counsel wished to introduce evidence that the victim had sexual relations with other black men, and further that one of

the state's witnesses, who was charged as an accessory after the fact in Butler's case, had caught a venereal disease from her. All this evidence was excluded by the trial court on the basis, inter alia, that evidence regarding the victim's character was not relevant. Tr. 478-514, State v. Horace Butler, supra.

In another decision which followed but did not rely on or cite Booth, the South Carolina Supreme Court disapproved prosecutorial argument which stressed the generosity and good deeds of the murder victim in an interracial robbery-murder. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). Viewed in the context of its past decisions, Reed provides a further example of the South Carolina courts' unwillingness to see capital sentencing proceedings degenerate into adversarial



post-mortem inquiries into the social worth of the murder victims.

The South Carolina courts' consistent rejection of these types of evidence and argument was unremarkable at the time the rulings were made. But if the range of capital sentencing considerations is now to be expanded to encompass the moral and religious character of the murder victim, all of these aspects of the victims' history and character must be deemed to have become relevant to rebut the prosecution's character evidence. See generally Barefoot v. Estelle, 463 U.S. 880, 901 (1983) ("the adversary process [can] be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of

the case"). Indeed, once the relevance of such character evidence is accepted, not even the absence of prosecution evidence or argument concerning the good character of the murder victim can serve to remove the victim's character as a sentencing consideration. Rather, evidence of the victim's bad character must be deemed "'mitigating' in the sense that it might serve 'as a basis for a sentence less than death,'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1976) (quoting Lockett v. Ohio, 438 U.S. 506, 604 (1978)), and its admission in mitigation constitutionally compelled. Compare Jurek v. Texas, 428 U.S. 262 (1976) (defendant's probable future dangerousness is a valid capital sentencing consideration) with Skipper v. South Carolina, supra (Eighth Amendment



requires admission of evidence tending to establish defendant's non-dangerousness).

This expansion of the range of relevant mitigating or rebuttal evidence will effect very disturbing changes in the other aspects of the capital sentencing process. If the weaknesses, limitations and human foibles of murder victims are to become fair game in capital sentencing proceedings, the duty to uncover and present such evidence will necessarily become one of the responsibilities of reasonably competent defense counsel in capital cases. See generally Burger v. Kemp, 483 U.S. ___, 107 S.Ct. 3114 (1987). No matter how personally distasteful to defense counsel, the search for evidence with which to minimize the sentencer's regard for the murder victim might be, the

prosecution's right to "ennoble" the victim by a one-sided presentation of his strengths and achievements will impose a corresponding duty on defense counsel to investigate and prove the victim's moral shortcomings and lapses, the burdens which the victim's failings or weaknesses may have imposed upon those around him, or anything else which might persuade the sentencer to devalue the victim's life.

Moreover, once the strengths and weaknesses of a murder victim are declared to be grist for the mill of adversary litigation, prosecutors who learn of information which might tend to lower the sentencer's estimation of the personal worth of the victim in a capital murder case will be constitutionally obligated to disclose such information to the accused under the due process



principles of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Bagley, 473 U.S. 667 (1985). The most intimate information concerning a murder victim's background inadvertently uncovered during a homicide investigation or revealed by grieving relatives or friends--facts that the victim suppressed throughout his lifetime--could be suppressed no longer as his killer's sentencing hearing approached. And if the state is correct in this case, the fact that the killer may have known nothing of his victim's background--good or bad--cannot serve to protect the victim's memory against attack as the defendant attempts to save his own life by convincing the jury that the loss to society occasioned by his crime was not so great as it might at first have appeared. In sum, the Booth

Court was wholly correct in its characterization of "a 'mini-trial' on the victim's character" as "more than simply unappealling." 107 S.Ct. at 2535. However well-intentioned may be those who, under the banner of "victims' rights," would have this Court constitutionalize the right of both prosecution and defense to mount such demoralizing legal sideshows in capital sentencing hearings, see, e.g., Brief of Amici Curiae Center for Civil Rights and the Stop! the Madness Foundation, a proper regard for the dignity and memory of each victim of murder no less than for the commands of the Eighth Amendment requires that the Court decline the invitation to do so.

D. The South Carolina Supreme Court correctly interpreted this Court's decision in Booth v. Maryland in this and



other decisions.

Petitioner suggests in its brief that the rule established by this Court in Booth is unworkable and is being misapplied and misunderstood by the lower courts. Petitioner's brief at 48, 56. However, a review of other decisions of the South Carolina Supreme Court resolving allegations of Booth error contradicts petitioner's contention. In State v. Bell, 293 S.C. 291, 360 S.E.2d 706 (1987), cert denied, ___U.S. ___, 108 S.Ct. 734 (1988), the appellant maintained that it was error to permit the state to introduce testimony regarding the character of the victim, her future plans and her lifestyle. The court, however, relying on Booth, determined that there was no constitutional violation because the

evidence of the victim's characteristics was directly related to the circumstances of the crime and had not been otherwise used in an impermissible manner. 293 S.C. at 302-03. Similarly, in State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988), it was maintained on appeal that evidence regarding the victim's habits and family life violated the Eighth Amendment. Again the court determined that there was no error because the evidence was introduced at the guilt phase of the trial "as circumstantial evidence that the victim's sudden disappearance was not voluntary." 295 S.C. at 472.

Bell, Howard and Gathers, viewed together, clearly indicate that the South Carolina Supreme Court has properly interpreted and applied the Eighth



Amendment principles set forth in Booth v. Maryland, and the other capital punishment decisions of this Court. A review of these three decisions reveals that the state court has, consistent with Booth, determined that where evidence of a victim's character is related to the circumstances of the crime, and is not used in a constitutionally impermissible manner, the evidence is properly admissible even though it may increase the state's chance of obtaining a death sentence. However, the state court determined that when, as in respondent's case, evidence of a victim's christianity and citizenship are used for the sole purpose of suggesting that a capital defendant should be sentenced to death, a resulting death sentence cannot stand. Thus the South Carolina Supreme Court

correctly recognized that in respondent's case it was the use to which the Game Guy's prayer and the voter registration card were put--to argue that Gathers should be sentenced to death because the victim was a good Christian and citizen--that violated the Eighth Amendment.

II. BECAUSE SOUTH CAROLINA LAW PRECLUDED RESPONDENT FROM INTRODUCING EVIDENCE REGARDING THE VICTIM'S BAD CHARACTER AS A SENTENCING CONSIDERATION, HIS DEATH SENTENCE WAS SECURED IN VIOLATION OF THE DUE PROCESS CLAUSE AS HE WAS DEPRIVED OF AN OPPORTUNITY TO MEET AND REBUT THE STATE'S ASSERTIONS.

As was noted previously in this brief, both the justices in the majority and the dissenting justices in Booth agreed that "if the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence." 107 S.Ct. at



2535; 107 S.Ct. at 2541 ("[n]o doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement") (Justice White dissenting).[6] The Booth majority concluded that to permit character rebuttal evidence created the "prospect of a 'minitrial' on the victim's character. . . [which] could well distract the jury from its constitutionally required task--

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[6]This aspect of Booth was grounded in the due process principles established in Gardner v. Florida, 430 U.S. 349 (1977) (due process requires that a capital defendant be given a chance to rebut material contained in a pre-sentencing report), and Skipper v. South Carolina, 476 U.S. 1, 5, 9-12 (1986) (all nine justices agreeing--both in the majority and concurring opinions--that it violated Gardner v. Florida to exclude evidence of the defendant's adaptability to prison but yet permit the prosecutor to argue the defendant's future dangerousness as a reason to impose the death penalty).

determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." Id.[7] It was surely for this reason, some examples of which were set forth in subsection C of section I of this brief (supra at 35-50) that the South Carolina Supreme Court held in State v. Gaskins, two years before respondent's trial, that the bad character or criminal history of

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[7]Aside from the right of rebuttal, another fundamental principle of procedural due process is that an accused is entitled to notice as to the specific charges against him, and thus a fair opportunity to meet the prosecution's evidence. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal").



a murder victim is inadmissible in mitigation of the murderer's punishment.[8] See also State v. Bell, supra (recognizing that Gaskins precludes admission of evidence regarding victim's bad character).[9] Thus, both before and

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[8]Gaskins, who was an inmate serving a life sentence for murder, was prosecuted for the murder of a death row inmate, Rudolph Tyner. At the sentencing phase of his trial, Gaskins attempted to offer into evidence Tyner's confession to the murders for which he was convicted and sentenced to death. The trial judge would not permit Gaskins to introduce the evidence, and this claim was raised on direct appeal to the South Carolina Supreme Court. In its brief before that Court, the Attorney General argued the failure to admit the confession was not erroneous because "Tyner's [the victim's] character was irrelevant to the determination of whether Appellant's sentence should be life or death, and the trial judge properly excluded it." Brief of Respondent Attorney General in State v. Gaskins, supra at 72. The South Carolina Supreme Court agreed with the Attorney General, and affirmed Gaskin's sentence of death.

[9]Similarly, after holding that the prosecutor's argument violated the Eighth Amendment, the South Carolina Supreme

after this Court's decision in Booth v. Maryland, the South Carolina Supreme Court has ruled that a capital defendant may not introduce evidence regarding the bad acts or the bad character of a murder victim as a reason that a sentence of life imprisonment should be imposed.

Thus respondent's counsel prepared his defense in the reasonable belief that their client would not be required to rebut evidence or argument concerning the religious or civic virtues of the man he was accused of murdering. Moreover, had defense counsel attempted to mitigate their client's punishment by introducing evidence tending to denigrate the victim,

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Court in respondent's case acknowledged that State v. Gaskins supported its conclusion as it held that "evidence of [a] victim's bad character [is] not admissible as mitigating evidence in sentencing phase." 295 S.C. at 483, 369 S.E.2d at 144; J.A. 66.



there is little doubt that the rule of Gaskins would have been applied to prevent them from doing so. In sum, Gaskins deprived respondent both of the ability to attack the victim's character and of any notice that he might find himself impelled to do so by the state's trial tactics. And it was in this context that the prosecutor, without warning of any sort, transformed two bits of physical evidence into an impassioned appeal for a death sentence based on the supposed religious values and even saintliness of the murder victim.

Under such circumstances, what happened here plainly violated the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"

Skipper v. South Carolina, 476 U.S. at 5 n. 1, quoting Gardner v. Florida, 430 U.S. at 362.[10] Just as there is no doubt that a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement, there is also no doubt that respondent in this case was accorded no such opportunity. In Booth, state law expressly provided for the admission of

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[10]Similarly Justice Powell's concurrence in Skipper (joined by Chief Justice Burger and Justice Rehnquist) noted that:

> petitioner in this case was not permitted to "deny or explain" evidence on which his death sentence may, in part, have rested. This error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated petitioner's misconduct in prison after his arrest. Therefore, petitioner's death sentence violates the rule in Gardner.

476 U.S. at 11.



victim impact statements, and thus the defendant had both notice of the evidence, and a full opportunity to rebut that evidence had he wished to do so. Md.Ann.Code, Art. 41, §4-609(c) (1986); 107 S.Ct. at 2541. But South Carolina law provides just the opposite: defendants are expressly forbidden by Gaskins from advancing the bad character or record of their victims as reasons for leniency, and South Carolina's statutory capital sentencing scheme makes no provision for consideration of victim characteristics in aggravation of punishment. See State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (condemning prosecutorial argument concerning the purported good character of murder victim). Accordingly, the prosecutor's hyperbolic ennobling of the

murder victim in this case was fundamentally unfair because, even assuming the relevancy of the alleged religious characteristics on which it was based, the prosecutor's appeal was not subject to rebuttal or denial by the defendant. Gardner v. Florida, supra; Skipper v. South Carolina, supra.[11]

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[11]Furthermore, as this case involves the denial of the opportunity to rebut or explain prosecutorial argument, petitioner's reliance on Donnely v. DeChristofero, 416 U.S. 637 (1974) (test to determine impropriety of prosecutorial argument is whether the argument "so infected the trial with unfairness as to make the resulting [sentence] a denial of due process), is misplaced. See Petitioner's brief at 48. Rather, because the state relied upon the victim's religious and civic virtues as a reasons that respondent should be sentenced to death, under circumstances where he was not permitted to introduce evidence regarding the bad character of the victim, the rule of Gardner v. Florida and Skipper v. South Carolina is the proper standard by which to judge the prosecutor's argument in respondent's case, as opposed to the fundamental fairness standard of Donnely. Therefore, in respondent's case, the



The South Carolina Supreme Court's reliance on State v. Gaskins in its decision, as well as its reference to that part of the Court's reasoning in Booth having to do with a capital defendant's right of rebuttal, see 295 S.C. at 483-84, 369 S.E.2d at 144, J.A. 66, makes clear that it recognized this particular constitutional error in the sentencing phase of respondent's trial. Under these circumstances, the state court correctly held that as a result of its ruling in State v. Gaskins, respondent was denied the opportunity to explain or rebut the state's argument as to why he should be sentenced to death.

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violation of due process is established because he "was not permitted to 'deny or explain' evidence on which his death sentence may, in part, have rested." Skipper, 476 U.S. at 11 (Powell, J. concurring) (quoting Gardner v. Florida, supra).

Therefore, because established South Carolina law at the time of Gather's trial precluded the admission of evidence of the bad character of a murder victim, a straightforward application of the due process principles established by this Court in Gardner v. Florida, Skipper v. South Carolina and Booth reveal the constitutional infirmity in respondent's sentence of death. For this additional reason, the judgment of the South Carolina Supreme Court should affirmed, and Demetrius Gathers should be accorded the fair sentencing hearing to which every defendant, no matter what his crime, is constitutionally entitled.



## CONCLUSION

For the reasons set forth in this brief, amici respectfully submit that the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

H. PATTERSON McWHIRTER
President
South Carolina Public
Defenders' Association
119 East Main St.
Lexington, SC 29072
(803) 359-5522

DAVID I. BRUCK
Richland County Public
Defender
1701 Main St.
Columbia, SC 29201
(803) 765-2592

* JOHN H. BLUME
FRANKLIN W. DRAPER
S.C. Death Penalty
Resource Center
P.O. Box 11311
Columbia, SC 29201
(803) 765-0650

ATTORNEYS FOR
AMICI CURIAE

*Counsel of Record

January 31, 1989.